IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 29TH NOVEMBER 2007 / 8TH AGRAHAYANA 1929

AS.No. 402 of 1997()

OS.9/1995 of SUB COURT, TIRUR
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APPELLANT: PLAINTIFF

P.SHAMUGHAN, AGED 40 YEARS,
S/O.NARAYANA P.O. PURANGU
MALAPPURAM DISTRICT.

BY ADV. SRI.K.RAMACHANDRAN

RESPONDENTS: DEFENDANT IN THE COURT BELOW

THARAVYIL KUNHIMON, AGED 55,
S/O.ARAKKAL AREEKKATTYIL ABDULLA,
KUTTI MUSALIAR, PURANGU AMSOM, PARAMPAD
DESOM, P.O.PURANGU – 679 581,
MALAPPURAM DISTRICT.

BY ADV. SRI.T.KRISHNANUNNI

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 29/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.No. 402 of 1997

Dated this the 29th November, 2007.

J U D G M E N T

The plaintiff in O.S.No.9/1995, on the file of the Subordinate Judge's Court, Tirur, is the appellant. The appeal is filed against the decree and judgment passed by the learned Sub Judge, by which it refused the specific performance of an agreement, but directed the respondent-defendant to pay the amount of Rs.25,000/= with 12% interest per annum from 19.11.1994 till realisation together with cost to the appellant-plaintiff.

2. The plaintiff filed the suit on the following averments. The suit property originally belong to the defendant. On 19.11.1994, appellant and respondent herein, entered into an agreement, by which, the respondent had agreed to sell the suit property for a consideration of Rs.70,692.80. The respondent received an amount of Rs.25,000/= as advance towards sale consideration. The respondent had agreed to execute the document within one month, and the appellant had agreed to pay the balance amount of consideration before that date. The appellant was always ready and

willing to perform of contract, but the respondent was not willing to perform his part of contract. The appellant issued a notice demanding specific performance to which the respondent issued a reply notice raising false contentions. Hence, the suit for specific performance or in the alternative for return of Rs.25,000/= with interest at the rate of 18% per annum.

3. The respondent filed a written statement admitting his signature in the agreement, but denied the execution of an agreement for sale with the appellant. It was contended that appellant was a financier who was doing money lending business. Respondent had borrowed amounts from other persons in connection with the marriage of his daughter and when those persons demanded the repayment of the amounts advanced, he had to borrow an amount of Rs.20,000/= from the appellant, who was his neighbour. At that time, respondent had to affix his signature in one blank stamp paper and two other papers. The appellant assured him that because of their close acquaintance and the transaction was only for one month, the respondent need pay interest only at the rate of 12%. Subsequently, the appellant wanted a pathway through the property of the respondent, for ingress and egress to his property, which is

situated on the southern side of the suit property. The appellant unilaterally prepared an agreement on a stamp paper worth Rs.1000/= and approached the respondent with a request to sign the same. Respondent refused to oblige. Hence, the agreement was fabricated in the blank papers which contained the signature of the respondent. It is also contended that brother of the plaintiff had filed a suit against the respondent contending that he had a right of way through the suit properties.

4. On the side of appellant, Pws. 1 to 3 were examined and Exts.A1 to A3 proved and marked. Respondent gave evidence as DW.1. Exts.B1 to B4 were proved and marked. The trial court found that the defendant has not satisfactorily explained how his signature was found in Ext.A1. The court below rejected the contention of the respondent that signed blank papers were entrusted with the appellant at the time when he borrowed an amount of Rs.20,000/=. The court below further held that if specific performance is ordered, the appellant will get an unfair advantage and the property of the respondent will be divided into two halves, and hence, it is not a fit case in which the specific performance can be ordered. The trial court directed the respondent to return the amount of Rs.25,000/= received

as advance with 12% interest, to the plaintiff. Dissatisfied with that part of the decree by which specific performance was refused, the plaintiff himself has filed this appeal with a specific prayer that in this case, the court below ought to have ordered specific performance of the agreement for sale.

5. The learned counsel appearing for the appellant has argued that the course adopted by the trial court is against law, equity, weight of evidence and the circumstances of the case. It is argued that after finding that the agreement relied on by the appellant was genuine, the court below had seriously erred in not allowing the appellant to get the sale deed registered. It is contended that appellant had paid one-third of the total sale consideration as advance and the time fixed for specific performance was only one month. It is argued that the appellant was always ready and willing to perform his part of contract and it was the respondent who defaulted the execution of the sale deed. It is argued that the court below went wrong in denying the specific performance, after finding that the denial of the execution of the agreement by the defendant is false. It is argued that merely because there is a mistake in the description of the property, specific performance ought not have been disallowed. It is also

argued that the respondent who executed the agreement was fully aware of the fact that by selling such a land for the formation of a pathway, the remaining land will be divided into two halves. It is argued that reasons stated by the trial court for disallowing specific performance is perverse and illegal.

6. The learned counsel appearing for the respondent has pointed out that this is a case in which the trial court had refused specific performance for valid and cogent reasons. It is argued that the decree is in favour of the respondent, and, as such, he is entitled to support the decree passed by contending that even the findings which went against the respondent should have been decided in his favour. It is argued that the respondent in his written statement itself had admitted that he had received an amount of Rs.20,000/=, and he was ready and willing to pay back the same with interest. The dispute was only in respect of Rs.5000/=, and that is the reason why the respondent did not file any appeal.

7. The only question arising for consideration in this appeal is whether the finding of the court below that the appellant is not entitled to specific performance of the agreement is legal and proper.

8. Exts.B1 to B3 produced by the respondents along with the evidence of admission made by the appellant himself shows that he is a financier who was conducting money lending business. The case of the respondent is that he was compelled to borrow an amount of Rs.20,000/= from the appellant, and at that time, he had to affix his signature in one blank stamp paper and two blank white papers. It is also his case that appellant had agreed that the respondent need only pay 12% interest. According to the respondent, subsequently, the relationship between the appellant and himself became strained, because of his refusal to sell land for construction of a road through the middle of the property of the respondent.

9. The next question arising for consideration is whether the explanation offered by the respondent is probable or not. A reading of the description of the property given in the agreement will not show that, that property was intended to be sold for constructing a

pathway. If the intention of the parties was to sell the property for constructing a road, normally the length and breadth of the road would have been stated in the agreement. The evidence on record shows that on the northern side of the respondent's property, there is a public road which lies east west. On the south-eastern corner of the respondent's property, the appellant and his brother are having properties. The evidence adduced in this case shows that if the property included in Ext.A1 agreement for sale is sold to the appellant, that can be used for formation of a road connecting the public road on the northern side and the property of the appellant. As I have already stated, appellant and respondent are neighbors. If as a matter of fact, the intention was to sell a strip of land for the formation of a road, normally one would expect the parties to state that fact in the agreement itself. There is no such statement in Ext.A1 agreement. Further, even a reading of the description of the property will not give an impression that the property agreed to sold was meant for the formation of a road. It has come out in evidence that the agreement for sale was executed on 19.11.1994, and the time fixed for specific performance under Ext.A1 was one month from that date. So, the period for specific performance will be over only on 19.12.1994. But, on 12.12.1994, the appellant had issued notice through his advocate.

There is no averment in that notice to the effect that appellant-plaintiff made any demand for execution of the agreement and the respondent refused to execute the same. The appellant had no such case also. The suit was filed on 17.1.1995. In the plaint, there was no averment that the appellant wanted a strip of land for the purpose of constructing a road. The respondent has got a case that he borrowed Rs.20,000/= and after advancing the money, the appellant wanted the respondent to sell his land for forming a road, which he had declined. Ext.B4 is a copy of the plaint filed by the brother of the appellant. It was a suit filed for a declaration that the plaintiff in that suit was having a right of easement over the property. It is admitted by the appellant himself that the plaintiff in O.S.23/1995 were residing in the same house. Of course, PW.1 further deposed that his brother was in inimical terms with him. But, he had no such case when he was examined in chief. O.S.No.23/1995 was filed on 19.1.1995. If as a matter of fact, there was an agreement for sale between the appellant and the respondent, why his brother filed a suit, the exact date on which the period under Ext.A1 agreement was due to expire was not explained by the appellant. It is very difficult to accept the contention put forward by the appellant that his brother was in inimical terms towards him.

10. PW.1 himself had admitted that he is running a money lending business and he is lending money on the strength of agreements. According to the respondent, he was forced to affix his signature in blank papers when he borrowed Rs.20,000/=. That explanation cannot be discarded. If specific performance is ordered, the property of the respondent will be divided into two halves. It is also to be noted that there is mistake in the description of the property given in Ext.A1. It is stated that 6th plot is on the south of the 5th plot, but in the document, it is stated that 6th plot is on the east of the 5th plot. The conduct of the appellant in issuing the notice without any demand for specific performance long prior to the expiry of the period fixed for specific performance also create doubt regarding the genuineness of the agreement for sale.

11. The learned counsel appearing for the appellant has relied on the decisions reported in **Lekshmikutty Amma v. Govindan Nair** *(1963 KLT 956*); **K.Appa Rao and another v. P.Balasubramania Gramani and others** *(AIR 1976 Madras 70)*; **Prakash Chandra v. Angadlal and others** *(AIR 1979 SC 1241)*; **Sathy v. Sayed Mohammed** *(1998 (1) KLT 141)* and **K.Venkoji Rao v. M.Abdul Khuddur Kureshi** *(AIR 1991 KARNATAKA 119).* It is

argued that once the Court finds that the agreement is genuine, the Special Performance cannot be refused. In Sathy's case, cited above, a Division Bench of this Court held that when the Court exercises its discretionary jurisdiction, the Court has to exercise the same, on sound principles and not arbitrarily. In Prakash Chandra's case, cited above, the Apex Court held that, ordinary rule is that Specific performance should be granted, and it ought to be denied only when equitable considerations point to its refusal and the circumstances show that damages would constitute an adequate relief. There cannot be any dispute regarding the principles laid down in above said decisions.

12. The learned counsel appearing for the respondent relied on the decisions reported in **Narayana Pillai v. Kunju Amma** *(1989 (2) KLT 379),* and **Kunjamma v. Chellappan** *(2004 (3) KLT 78, short notes case.108).* He has argued that the Court is not bound to grant the relief of specific peformance merely because it is lawful to do so. In Kunjamma's case, (supra) it was held as follows:-

> "When interests of technicalities and those of substantial justice are pitted against each other, the Court shall strive to advance those of substantial justice rather than technicalities.

> The decree passed against the appellant in the suit and impugned by her in the regular first appeal preferred before the lower appellate court is a decree for specific performance of contract for sale of immovable property. The right of any party againt whom the trial court passes a decree and feels aggrieved by that decree to prefer an appeal is a statutory right conferred on him by the Code. The decision of a Court whether or not to grant positive decree of specific performance in a suit for specific performance rests on the discretion of the Court. In other words, even when the plaintiff is able to prove his claim in full and the court finds that it would be quite lawful to grant a decree to the plaintiff, it is always open to the Court to refuse such a decree on considerations of equity and direct the plaintiff to be satisfied with a decree for money in lieu of one for specific performance."

The learned Single Judge has considered the principles laid down in number of decisions by the Apex Court and held that it is always open to the Court to refuse such a decree on considerations of equity.

13. The facts and circumstances pointed out in this case shows that the appellant was a financier. The agreement does not contain any indication to the effect that the agreement was in respect of sale of land for the purpose of forming a road. The description of property given in Ext.P1 is wrong also. A reading of the description also will not give an impression that the property was

agreed to be sold for the formation of the road. One week prior to the expiry of the date fixed for specific performance under Ext.A1, without any reason, the appellant issued a notice through his lawyer demanding specific performance. The respondent promptly issued reply denying the execution of the agreement. The brother of the appellant who was residing along with him in the same building had filed another suit on 19.1.1995, that is, two days after the filing of the present suit. If specific performance is ordered, that will cut the respondent's property into two halves, making the same virtually useless. All these aspects were considered by the court below and refused specific performance. I do not find any reason to interfere with that discretion exercised by the trial court, and hence the appeal is only to be dismissed.

In the result, the appeal is dismissed.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

A.S.No.402 of 1997

J U D G M E N T

Dated: 29th November, 2007.